

International Law: Challenges for the 21st Century

Faculty of Law, Masaryk University, 18-20 April 2011

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Structure of the course

This is an intensive course: there will be six sessions over three days; each session devoted to a separate topic. Each session will last 90 minutes. I will give an introductory lecture on the topic.

There will be plenty of opportunities for you to ask questions and I hope that you will take advantage of this. It helps me to see what needs to be explained more and also gives me ideas on how best to present the issues.

Assessment

Assessment will be by essay. The essay must be no longer than 1500 words. At the end of your essay you must give a word count. The essay must be submitted to Katerina.Novotna@law.muni.cz, by May 20.

1. Fundamental Principles of International Law

The class will consider how these principles have emerged and particular problems that arise with regard to their application in the contemporary international community. The point is that international law, like international relations, is not static. After the collapse of communism in 1989-91, people started to talk about “the end of history” – as if the end of the cold war had settled the major divisions confronting the world. In fact, as is now obvious, we simply entered another phase of history, with the spectre of the cold war replaced by new challenges posed by international terrorism, emerging democratic movements and failed States. How does international law work twenty years on?

United Nations Charter (1945)

<http://www.un.org/en/documents/charter/index.shtml>

- Sovereign equality of States
- Non-intervention
- Prohibition on threat or use of force
- Peaceful settlement of disputes
- Respect for human rights
- Self-determination of peoples

Purposes of UN: Art 1

- Maintain international peace and security
- Develop friendly relations among nations
- Achieve international cooperation in solving international problems
- Co-ordinate and harmonise actions to achieve these ends

Principles of UN: Art 2

- Sovereign equality of all members
- Disputes to be settled by peaceful means
- Prohibition on threat or use of force against territorial integrity or political independence of other States

Questions

1. What is meant by the notion of ‘sovereign equality of States’? Is it absolute or limited? Think of examples to justify your view.

2. If you could make one major reform to the United Nations, what would it be, and why?

3. Does the Security Council function effectively? From the perspective of international law, consider the principal reasons for the difficulties encountered by the Security Council.

4. How do you evaluate the action of the Security Council with regard to Libya and Ivory Coast?

2. Challenges to International Personality

This class will consider what actually is a subject of international law: who has rights and duties to act at the international level. We will consider the extent to which human beings now have international capacity and the ramifications of having such personality.

Who are the subjects of International Law?

- States
- International organisations
- Human beings
- NGOs
- Corporations

What is a State?

Montevideo Convention on Rights and Duties of States 1933

Article 1: a State should possess the following qualifications:

- (a) a permanent population; (b) a defined territory; (c) government; (d) capacity to enter into relations with other States

Arbitration Commission of the European Conference on Yugoslavia

Opinion No.1: “the state is commonly defined as a community which consists of a territory and a population subject to an organised political authority”

What about:

- Eastern Libya
- Wales
- Transnistria
- Somalia – failed States
- Republika Srpska
- Chechnya
- Southern Ossetia and Abkhazia
- Turkish Republic of Northern Cyprus
- Holy See/Vatican City
- McDonalds – Human Rights Council, “Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development.”, 7 April 2008. (Subtitle: Protect, Respect and Remedy: A Framework for Business and Human Rights). The Report was written by Prof. John Ruggie, the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises.
- Human rights and international criminal responsibility

Kosovo: is it a State?

Kosovo



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Kosovo declares independence – 17 February 2008

Czech Republic recognises Kosovo – 21 May 2008; altogether 76 States have recognised Kosovo.

Legal issues

- right of territorial integrity/ duty to respect territorial integrity
- right of self-determination/secession

The legal context

- Security Council Resolution 1244, 10 June 1999
- Statement by the Chairman on the conclusion of the G-8 meeting of Foreign Ministers, Petersberg Centre, 6 May 1999
- Paper presented to, and accepted by, the Yugoslavian Government, Belgrade, 2 June 1999

SC Res. 1244

Preamble:

Reaffirming the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia...

Reaffirming the call in previous resolutions for substantial autonomy and meaningful self-administration for Kosovo...

5. Decides on the deployment in Kosovo, under United Nations auspices, of international civil and security presences... and welcomes the agreement of ... Yugoslavia to such presences;

10. Authorizes the Secretary-General... to establish an international civil presence in Kosovo in order to provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within... Yugoslavia, and which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo;

11. Decides that the main responsibilities of the international civil presence will include:

(a) Promoting the establishment, pending a final settlement, of substantial autonomy and self-government for Kosovo...

(c) Organizing and overseeing the development of provisional institutions for democratic and autonomous self-government pending a political settlement...

Annex 1

G-8 Statement, 6 May 1999

- adopted several general principles on a political solution to the Kosovo crisis, including:

A political process towards the establishment of an interim political framework agreement providing for a substantial self-government for Kosovo, taking full account of the Rambouillet accords and the principles of sovereignty and territorial integrity of... Yugoslavia...

Annex 2

Paper presented to, and accepted by, the Yugoslavian Government, Belgrade, 2 June 1999

- requires agreement to be reached on certain principles to move towards a resolution of the Kosovo crisis:

5. Establishment of an interim administration for Kosovo as part of the international civil presence under which the people of Kosovo can enjoy substantial autonomy within... Yugoslavia...

8. A political process towards the establishment of an interim political framework agreement providing for substantial self-government for Kosovo, taking full account of the Rambouillet accords and the principles of sovereignty and territorial integrity of... Yugoslavia...

Accordance with International law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, International Court of Justice, 22 July 2010:

<http://www.icj-cij.org/docket/files/141/16010.pdf>

Please read this summary of the Opinion before the lecture.

Questions

1. Is Kosovo a State? What happens next?
2. What will happen to Libya and what role of international law will international law play?
3. Do human beings owe human rights obligations?
4. How should the international community deal with “failed States”?

3. The Use of Force: Lessons from the Libyan Conflict

The legitimacy of the use of force, and the circumstances in which force may be used, are currently amongst the most keenly debated issues in International Law. The threat or use of force is prohibited except in self-defence and/or under the authority of the UN Security Council. Nevertheless there are many examples of apparently unlawful use of force in recent years by one State against another.

International law is also confronted by new challenges to States’ security: how may States respond to repeated attacks on their civilian shipping, carried out by pirates based in a territory where the State is unable or unwilling to take effective action to address the threat posed by the pirates? Furthermore, may a State intervene in another State by force to prevent that other State perpetrating serious human rights abuses against its own people? That is not a new question; however, a new response may be emerging, in particular in light of the recent developments in Libya.

Does the international community have a responsibility to intervene – a so-called *responsibility to protect* – when a State commits serious attacks on its own citizens, and if so, how far may such intervention go. Is this what is happening in Libya?

UN Charter

Article 2(4): All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

Article 51: Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary to maintain or restore international peace and security.

Article 42: Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by

air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

Nicaragua Case (1986)

Corfu Channel Case (1949)

Declaration on Friendly Relations Between States 1970, GA Res 2625 (XXV)

Definition of Aggression - GA Res 3314

Nuclear Weapons Advisory Opinion (1996), paras 37-50, 97

Caroline Case (1837)

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Advisory Opinion (2004), paras 138-139

Oil Platforms Case (2003), paras 31-78, esp. paras 76-77

Congo v Uganda (2005), paras 106-166

Report of the International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (2001):

<http://www.iciss.ca/report2-en.asp>

Prohibition on the use of force

Right of self defence – individual and collective

Use of force to rescue nationals

Humanitarian intervention: a responsibility to protect?

The Iraq Conflict (2003)

Security Council Resolution 1441 (2002)

Acting under Chapter VII of the UN Charter, the SC

Para 1

“Decides that Iraq has been and remains *in material breach* of its obligations under relevant resolutions, including resolution 687 (1991), in particular through Iraq’s failure to cooperate with United Nations inspectors and the IAEA, and to complete the actions required under paragraphs 8 to 13 of resolution 687 (1991)...”

Para 13

“Recalls...that the Council has repeatedly warned Iraq that it will face *serious consequences* as a result of its continued violations of its obligations...”

The Libya Conflict (2011)

Security Council Resolution 1970 (2011), 26 February 2011

<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/245/58/PDF/N1124558.pdf?OpenElement>

Preamble

- referred to “serious violations of human rights and international humanitarian law” being committed in Libya
- “Considering that the widespread and systematic attacks currently taking place in ...[Libya] may amount to crimes against humanity”

“Acting under Chapter VI of the Charter ..., and taking measures under its Article 41”

Introduced various measures:

- Referral to ICC
- Arms embargo
- Travel ban
- Asset freeze
- Sanctions Committee

Security Council Resolution 1973 (2011), 217 March 2011

<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/268/39/PDF/N1126839.pdf?OpenElement>

Preamble

Reiterating the responsibility of the Libyan authorities to protect the Libyan population and reaffirming that parties to armed conflicts bear the primary responsibility to take all feasible steps to ensure the protection of civilians...

Reaffirming its strong commitment to the sovereignty, independence, territorial integrity and national unity of the Libyan Arab Jamahiriya...

Determining that the situation in the Libyan Arab Jamahiriya continues to constitute a threat to international peace and security,

Acting under Chapter VII of the Charter of the United Nations...

3. *Demands* that the Libyan authorities comply with their obligations under international law, including international humanitarian law, human rights and refugee law and take all measures to protect civilians and meet their basic needs, and to ensure the rapid and unimpeded passage of humanitarian assistance;

Protection of civilians

4. *Authorizes* Member States that have notified the Secretary-General, acting nationally or through regional organizations or arrangements, and acting in cooperation with the Secretary-General, to take **all necessary measures**, notwithstanding paragraph 9 of resolution 1970 (2011), to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory, and *requests* the Member States concerned to inform the Secretary-General immediately of the measures they take pursuant to the authorization conferred by this paragraph which shall be immediately reported to the Security Council...

Questions

1. Did the attacks on the USA on 11 September 2001 trigger a right to use force in self-defence?

2. What are the principal restrictions on the use of force by a State in self-defence?

3. Should a State be entitled to use nuclear weapons in self-defence?
4. What is the legal basis for collective security action through the United Nations?
5. Is the ICJ correct to state, as it did in *The Wall Advisory Opinion*, that Israel had no right of self-defence with regard to the attacks made upon it because they had not been made by a State?
6. May a State attack pirates based in Somalia in response to pirate attacks on ships that fly its flag?
7. Does SC Resolution 1973 (2011) justify the use of force to remove the Libyan government from power?

4. Challenges to Human Rights During Armed Conflicts and the Role of International Humanitarian Law

International humanitarian law (IHL) seeks to protect human rights during armed conflict. The body of law is now very large, yet the essence of IHL may be distilled into a few principles. Can we say that IHL is adequate given the extreme violations that occur in modern armed conflicts, such as mass rape and sexual violence in the Democratic Republic of Congo? What has been the impact of the emerging international criminal law, which now denies immunity to Heads of State?

For a superb resource with primary and secondary sources (in particular, the *International Review of the Red Cross*), please refer to the website of the International Committee of the Red Cross: <http://www.icrc.org/eng>

Definition of IHL

- principles and rules that limit the use of violence during armed conflicts:
 - o to spare those not directly involved in hostilities
 - o limit the effects of violence to the amount necessary for the purpose of war

Origins of IHL

- Henry Dunant, Battle of Solferino (1959)
- Lieber Code (Instructions for the Government of Armies of the United States in the Field (1863)
- Foundation of ICRC and first National Red Cross Societies (1963)
- First Geneva Convention (1864)
- St Petersburg Declaration Renouncing the Use, in Time of War, of Certain Explosive Projectiles (1868)
- Oxford Manual on the Laws of War on Land (1880)

Sources

- Hague Law
 - o Conventions of 1899 and 1907 dealing with the actual conduct of hostilities – regulating the means and methods of warfare

- Geneva Law
 - o Four conventions (1949) and three protocols (1977, 2005) relating to the protection of persons hors de combat or not taking part in hostilities – sick and wounded, prisoners of war, civilians
- more specific treaties
 - o conventions prohibiting or regulating the use of specific types of weapons, eg anti-personnel landmines, or establishing specialised protection regimes, eg for cultural property
- customary international law
 - o *Nuclear Weapons Advisory Opinion* (1996 ICJ Reports)
 - o ICRC study on Customary International Humanitarian Law (2005)
- humanitarian law principles
 - o basic principles underlying IHL

IHL and Public International law

- IHL protects human rights during armed conflicts – how does it differ from human rights law?
- *jus in bello* v *jus ad bellum*

When does IHL apply?

- international armed conflicts (IACs)
- non-international armed conflicts (NIACs)
 - o IACs –
 - Geneva Conventions (1949), common Art 2:
 - o all cases of declared war or of any other armed conflict which may arise between two or more Parties, even if they do not recognise the state of war
 - o all cases of partial or total occupation of the territory of a Party, even where there is no resistance to the occupation
 - Additional Protocol I (1977), Art 1.4
 - o Armed conflicts where people are fighting against colonial domination and alien occupation and against racist regimes in exercise of their right to self-determination
 - o NIACs-
 - Geneva Conventions (1949), common Art 3:
 - o “armed conflicts not of an international character”
 - Additional Protocol II (1977)
 - o NIACs taking place in territory of a party, between its armed forces and dissident armed forces or other organised armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained military operations and to implement the Protocol

- Note threshold – it does **NOT** apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and similar acts.

Fundamental principles of IHL

Martens clause – in cases not covered by treaties, civilians and combatants remain under the protection and authority of the principles of international law derived from custom, from the principles of humanity and from the dictates of public conscience (1899)

Humanity – this aims to restrict activities that might otherwise be justified as not contrary to specific treaties and allowed by military necessity

Necessity – those measures indispensable for securing the aims of the conflict, and which are not contrary to laws of armed conflict

Distinction

- parties to a conflict must at all times distinguish between the civilian population and combatants in order to spare civilian population and property.
- Neither the civilian population as such nor civilian persons shall be the object of attack
- Attacks shall be directed solely against military objectives

Proportionality

- Parties to a conflict and members of their armed forces do not have an unlimited choice of methods and means of warfare: it is prohibited to employ weapons or methods of warfare of a nature to cause unnecessary losses or excessive suffering

International humanitarian law: the essential rules

These rules, drawn up by the ICRC, summarize the essence of international humanitarian law. They do not have the authority of a legal instrument and in no way seek to replace the treaties in force. They were drafted with a view to facilitating the promotion of the law.

The parties to a conflict must at all times **distinguish between the civilian population and combatants** in order to spare the civilian population and civilian property. Neither the civilian population as a whole nor individual civilians may be attacked.

- Attacks may be made solely against military objectives. People who do not or can no longer take part in the hostilities are entitled to respect for their lives and for their physical and mental integrity. Such people must in all circumstances be protected and treated with humanity, without any unfavorable distinction whatever.
- It is forbidden to kill or wound an adversary who surrenders or who can no longer take part in the fighting.
- Neither the parties to the conflict nor members of their armed forces have an unlimited right to choose methods and means of warfare. It is forbidden to use weapons or methods of warfare that are likely to cause unnecessary losses or excessive suffering.
- The wounded and sick must be collected and cared for by the party to the conflict which has them in its power. Medical personnel and medical establishments, transports and equipment must be spared.
- The red cross, red crescent or red crystal on a white background is the distinctive sign indicating that such persons and objects must be respected.
- Captured combatants and civilians who find themselves under the authority of the adverse party are entitled to respect for their lives, their dignity, their personal rights and their political, religious and other convictions. They must be protected against all acts of violence or reprisal. They are entitled to exchange news with their families and receive aid. They must enjoy basic judicial guarantees.

Questions

1. Is the conflict in Libya international or non-international?

2. "...if international law is, in some ways, at the vanishing point of law, the law of war is, perhaps even more conspicuously, at the vanishing point of international law." (H.Lauterpacht, 1952)

What do you think Lauterpacht meant when he wrote this statement?

3. IHL and the soldier's dilemma

In the early morning, a column of tanks and personnel carriers made their way down

the road of the heavily populated outskirts of the city. We were hemmed in by the wire fence of an air base on our left and a long narrow hamlet of buildings on our right. We stopped to assess the situation. My mate ducked inside the turret of the tank, saying: "I don't like the look of this". Our radio operator turned to me and said that he'd just heard reports of lots of guerilla soldiers hiding out in the area.

From where I rode, as tank gunner, I had a pretty clear view. Sure enough, through the dust and overcast morning weather, I could see silhouettes darting into positions among the cluster of village houses opposite our platoon of men in the personnel carriers up the road. I could see that the figures were clearly armed. Someone shouted to open fire.

You are the tank gunner. What do you do?

4. Could the use of nuclear weapons ever be in conformity with international humanitarian law?

5. A soldier is attacked by a boy who looks about twelve years old. The boy fires a gun at him, misses, then turns round to run away. At this point the soldier returns fire, hitting the boy in the back and killing him.

What issues of international humanitarian law arise?

5. Trafficking in Human Beings

No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

(Universal Declaration of Human Rights, Article 4)

One of the most serious long-term effects of armed conflicts is to cause mass displacement of people. This can persist for years after a conflict has ended. This poses real problems for countries where people seek refuge, such as Tunisia and Libya having to take care of thousands of people, fleeing the conflict in Libya. Significant migratory pressures are created.

These pressures expose vulnerable people, especially women and children, to the risks of people smuggling and people trafficking. This class addresses these issues.

European Union, Fight against Trafficking in Human Beings
<http://ec.europa.eu/anti-trafficking/>

UNODC, Global Report on Trafficking in Human Beings
<http://www.unodc.org/unodc/en/human-trafficking/global-report-on-trafficking-in-persons.html>

UNODC, Human Trafficking and Migrant Smuggling
<http://www.unodc.org/unodc/en/human-trafficking/index.html?ref=menuside>

Council of Europe, Action against Trafficking in Human Beings

http://www.coe.int/t/dghl/monitoring/trafficking/default_en.asp

US Department of State. Office to Monitor and Combat Trafficking in Persons:

<http://www.state.gov/g/tip/>

Anti-Slavery: <http://www.antislavery.org/>

I. Examples of trafficking in human beings (THB)

- Prostitution
- Sweat shops
- Domestic labour
- Forced marriage
- Agricultural labour
- Sport (eg camel jockeys)
- Adoption
- Organ transplants
- Begging

Trafficking and smuggling distinguished

II. Concepts

- THB
- Deception, coercion, violence
- Exploitative end purpose: slavery, forced labour
- Violation of victim's rights
- May involve illegal crossing of border

Principal legal issues

- Human rights of those trafficked or smuggled
- Criminal law (international and national)
- Immigration law
- Employment law
- Laws on prostitution

THB as Slavery

Prosecutor v Kumarac, Kovac and Vukovic, Trial Chamber, Judgment, Case nNo. IT-96-23-T and 23/1, especially par.542

Hadijatou Mani Koraou v Niger, ECOWAS Court of Justice, Judgment No. ECW/CCJ/JUD/06/08

THB and Human Rights

Rantsev v Cyprus and Russia, Application no. 25965/04, European Court of Human Rights, Judgment of 7 January 2010

III. THB under International Law

UN Convention Against Transnational Organised Crime 2000

Trafficking

Protocol to Prevent, Suppress and Punish Trafficking in Persons, in Particular Women and Children (Palermo Protocol)

- Entered into force December 2003
- 143 parties (April 2011); Czech Republic has signed but not ratified

Article 3

- (a) “Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs...

Three elements:

- the act
- the method
- the motivation
- Consent of victim not relevant where any of above methods are employed
- Where victim is a minor (under 18) it is THB even if none of above methods are used

Limitations

- Deals only with transnational THB
- Focus primarily on prevention of crime rather than protection of human rights
- Limited measures addressing rights of victims
- Article 6 – limited obligations of assistance to victims

IV. The Wider International Law Regime

Treaties

- Convention Concerning Slavery (1926)
- ILO Convention No.29 on Forced Labour (1930)
- Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1949) plus Additional Protocols I and II (1977)
- Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949)
- Convention on the Elimination of Discrimination Against Women (1979)
- Convention in the Rights of the Child (1989)
- ILO Worst Forms of Child Labour Convention (1989)

- Convention on the Protection of the Rights of All Migrant Workers and Their Families (1990)
- Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (2000)
 - In force January 2002
 - parties
 - national and transnational trafficking
 - Protection of rights of child victims/witnesses during criminal proceedings
- SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution (2002)
- Council of Europe Convention on Action Against Trafficking in Human Beings (2005)
 - Needed 10 ratifications to enter into force; has 34 (8 April 2011; Czech Republic has neither signed nor ratified)
 - Stresses victims' rights and protection of victims equally with action to combat THB
 - Same definition as Palermo Protocol, except:
 - THB does not have to be transnational (Art.2)
 - Defines "victim": "any natural person who is subject to trafficking in human beings [as defined in Art.4]"
 - Obligation to promote "a Human Rights-based approach" (Art.5(3))
 - Minimum standards set for provision of assistance to victims to promote physical, psychological and social recovery
- Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (2007)
-

Soft Law

- UN High Commissioner for Human Rights: Recommended Principles and Guidelines on Human Rights and Human Trafficking (2002)
 - Human rights of victims of THB to be *at the centre* of all anti-THB efforts
 - States' obligations to act against THB and help victims
 - Anti-THB measures must not adversely affect rights of individuals, especially victims of THB, migrants, IDPs and refugees
- EU/IOM: Brussels Declaration on Preventing and Combating Trafficking in Human Beings (2002)
- UNHCR: Guidelines on application of Refugees Convention to victims of THB (2006)
- ASEAN: Declaration Against Trafficking in Persons Particularly Women and Children (2004)
 - Policies on coordination of anti-THB measures
 - Limited acknowledgment of human rights of victims
- Council of Europe
- OSCE
 - Action Plan to Combat Trafficking in Human Beings, July 2003
 - National Referral Mechanisms
- Stability Pact for South Eastern Europe

V. International Protection Regime

Victims of THB have no special entitlement to remain in the destination State.

Under the law of international protection, destination States may have an obligation to permit victims of THB to remain on their territory.

- Victims of THB in a foreign country frequently wish to return to their home country once they are no longer under the control of their traffickers; destination States generally want them to return
- Some victims may fear returning because of danger or threats to which they might be exposed at home
 - Risk of re-trafficking
 - Shame/embarrassment
 - Ostracism
 - Victimisation by national authorities
- Some victims may have given evidence against their traffickers

The principle of *non-refoulement* obliges States not to return anyone to a territory where they will be killed or at risk of a serious breach of their basic human rights

- Applies to threats posed by the State, or by non-state actors where the State is unable or unwilling to offer effective protection
- Convention Relating to the Status of Refugees 1951, Article 33 – *non-refoulement*

Convention Relating to the Status of Refugees 1951

Article 1A

For the purposes of the present Convention, the term ‘refugee’ apply to any person who... (2)... owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country...

Council Directive 2004/83/EC of 29 April 2004 (“Qualification Directive”) - on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection

- Article 6: Persecution can be by
 - the State
 - parties or organizations controlling the State or a substantial part of its territory
 - non-state actors, where the State or those in control are unable or unwilling to provide protection against persecution or serious harm
- Article 15: Entitlement to subsidiary protection based on following threats:

- Death penalty or execution
- Torture or inhuman or degrading treatment or punishment in the country of origin
- Serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of armed conflict

Where a victim of THB can show a reasonable likelihood that her basic human rights are at serious risk should she be repatriated, the State of destination may have to permit her to remain, although the general view is that repatriation is the preferable option

Possible entitlement of victims of THB to international protection:

- Palermo Protocol (2000), Article 7(1), 14(1)
- UN High Commissioner for Human Rights: Recommended Principles on Human Rights and Human Trafficking (2002), Principle 11
- EU/IOM: Brussels Declaration on Preventing and Combating Trafficking in Human Beings (2002), Point 13
- United Nations High Commissioner for Refugees: Guidelines on International Protection – Membership of a Particular Social Group (2002), Point 12
- United Nations High Commissioner for Refugees: Guidelines on International Protection – Gender-Related Persecution (2002), Point 18
- United Nations High Commissioner for Refugees: Guidelines on International Protection – Application of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol on the Status of Refugees to Victims of Trafficking (2006)
- Council of Europe Convention on Action Against Trafficking in Human Beings (2005), Article 16(2), 40(1)

VI. International Criminal Law

UNCTOC

Art 15 – obligation to establish jurisdiction with regard to certain offences:

- Participation in organised criminal group
- Laundering of proceeds of crime
- Corruption
- Obstruction of justice

Art 16 – extradition arrangements

Art 18 – mutual legal assistance obligation

THB Protocol

Art 2 – purposes

- Prevent and combat THB, especially of women and children
- Protect and assist victims of THB
- Promote cooperation amongst states to meet these objectives

Art 5 – obligation to criminalise THB (including attempting or participating as an accomplice, organising or directing others to do so)

Art 9 – obligation to establish comprehensive policies and programmes “to prevent and combat” THB

Convention on the Rights of the Child, Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography

Art 3 – obligation to criminalise

ICC Statute

War crimes – Art 8

- distinction between International Armed Conflicts (IACs) and Non International Armed Conflicts (NIACs)

IACs

Art 8.b.viii - deportation of population

Art 8.b.xxi - outrages upon personal dignity

Art 8.b.xxii – rape, sexual slavery, enforced prostitution

NIACs

Art 8.c.vi – rape, sexual slavery, enforced prostitution

Crimes against humanity – Art 7

- must be widespread or systematic attack against the civilian population

- no distinction between IACs and NIACs; does not have to be during armed conflict

Art 7.1.c – enslavement

Art 7.1.d – deportation or forcible transfer

Art 7.1.g – rape, sexual slavery, enforced prostitution

Art 7.2.c – “Enslavement” means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of the trafficking in persons, in particular women and children...

The link with slavery

Prosecutor v Kunarac, Kovac and Vukovic, IT-96-23-T and IT-96-23/1-T

Case Study – please read this before the class

A case of modern day slavery in the suburbs

By Chris Summers BBC News

A pensioner has been convicted of trafficking and exploiting an African woman she used as a slave. While it was the first prosecution of its kind, could there be many more cases behind the UK's front doors?

An innocuous bungalow in a leafy London suburb might not be an obvious location for "modern-day slavery". But that is what 47-year-old Mwanamisi Mruke suffered at

the hands of Saeeda Khan. The 68-year-old hired Mrs Mruke in her native Tanzania in 2006 after she was made redundant from the hospital in Dar es Salaam run by Khan and her late husband.

Khan arranged a domestic service visa and promised to pay her 120,000 shillings (£21) a month into her Tanzanian bank account and £10 a month pocket money in London. Mrs Mruke, desperate to fund her daughter Zakia's college education, agreed.

But when she got to London, Khan took her passport away, forced her to sleep on the kitchen floor and gave her two slices of bread a day for food. Her clothes were kept in a garden shed. Between 0600 and midnight each day, Mrs Mruke was expected to be at the beck and call of Khan, who would ring a bell when she or her two grown-up, disabled children wanted something.

“They have such disregard for these people that they don't think they are doing anything wrong. They think they are worth less than an animal”
Detective Inspector Kevin Hyland Metropolitan Police

Sometimes she would even be woken during the night to take Khan's son out for a walk. Mrs Mruke did not get a single day off in four years. Trapped in the house in Harrow, north-west London and terrified by veiled threats made by Khan, Mrs Mruke was cowed into submission. Khan, who watched television in her native Urdu, deliberately did not teach Mrs Mruke any English and conversed with her in Swahili. After a while, the pittance she was being paid dried up completely. Khan refused to let her return home after the deaths of her mother and father or for her daughter's wedding in 2009.

Caroline Haughey, prosecuting, told Southwark Crown Court: "From the moment of her arrival in England Mwanamisi was made to sleep, work and live in conditions that fall by any understanding into that of slavery."

Eventually, in February 2010, during a visit by Mrs Mruke to her local GP, the doctor and an interpreter - Rhoda Mwanga - became concerned about her living conditions and her interaction with Khan. Mrs Mwanga contacted a charity, Kalayaan, which looks out for people trafficked into domestic servitude. It in turn rang the police. Ten days later, police officers, accompanied by Mrs Mwanga and staff from Kalayaan, visited Khan's home and took Mrs Mruke to a place of refuge.

Mrs Mwanga told the court: "When we were in the kitchen, Mwanamisi said 'that's where I sleep' and pointed at the floor."

Khan was arrested and later charged with trafficking a person for exploitation. During the investigation police found a sinister letter, written in Swahili and by someone in Tanzania, which warned Mrs Mruke not to complain about her treatment. The letter said: "While you're still working with the woman and her children you must obey her all the time and you must do your work with love and show your love to the children." The letter warned her that her life might be in danger if she spoke out, adding: "We are asking you to stay quiet in that place and to continue with work peacefully. Your blessing will be in Heaven, not here."

Her daughter, Zakia Ali Hassan, speaking by videolink via a Swahili interpreter, told the court how happy her mother was when she was rescued from Khan's clutches. She added: "I would have loved for my mother to be there [at my wedding] but I had no choice."

Because Mrs Mruke has been unable to return to Tanzania since being rescued, Judge Geoffrey Rivlin allowed the videolink to be kept open for a few minutes to allow mother and daughter to see and speak to each other.

On Wednesday Khan was given a nine-month prison sentence, suspended for two years, and was ordered to pay £25,000 in compensation to Mrs Mruke and £15,000 in costs.

Speaking after the conviction, Ms Mruke said: "I didn't have any time for myself at all. I worked for very long hours - sometimes I didn't sleep. I used to do all the housework, cook, cleaning, inside and out. "She didn't attack me physically. It was just the words and the way she was treating me."

Det Insp Kevin Hyland, who headed the investigation, said it was the first time someone had been prosecuted for trafficking a "slave" for domestic servitude. He said the Metropolitan Police were currently investigating another 15 cases of trafficking for forced labour, and had worked with forces in Surrey, Sussex, Hertfordshire and the West Midlands on similar cases. Mr Hyland said: "We are seeing more of this but we are putting it down to improvements in our intelligence-gathering. We have introduced a new system of direct reporting which allows charities and NGOs to notify us directly."

Mr Hyland said the cases under investigation involved individuals from Saudi Arabia, India, Bangladesh, Tanzania, Uganda and Vietnam. "In some of these cases their culture is a class system and people can be treated as a commodity," he said. "They have such disregard for these people that they don't think they are doing anything wrong. They think they are worth less than an animal."

Mr Hyland said anyone employing a domestic servant in the UK on more than a very temporary basis has to pay them at least minimum wage and treat them according to UK laws. About Mrs Mruke, he added: "She may want to go back to Tanzania, because she has a family there. But if she can't go back for fear of reprisals I'm sure that would be looked upon positively by the UK Border Agency."

A spokeswoman for Kalayaan said: "Law enforcement has typically struggled to identify trafficking for domestic servitude because domestic work itself is lawful and need not be exploitative. "We are therefore encouraged that a case has finally come to the court under the Asylum and Immigration (Treatment of Claimants) Act that was passed nearly seven years ago."

Questions

1. What is the difference between smuggling and trafficking of human beings? Give examples to illustrate this.

2. Discuss the legal nature of trafficking in human beings. In particular, is it:

- a) a crime?
- b) a violation of human rights?
- c) both a crime and a violation of human rights?

3. Outline and discuss the significance of the *Kunarac* case (*Prosecutor v Kunarac, Kovac and Vukovic*, IT-96-23-T and IT-96-23/1-T) for the development of international criminal law with regard to trafficking in human beings.

4. A, aged 16, has been brought from Vietnam to the Czech Republic by a distant male relative on the pretext that she could have an extended holiday. However after her arrival in Brno the man made it clear that she would be working for him and that he intended to force her into prostitution. She gave evidence that the man had already bought her the clothes she was to wear while working as a prostitute. He had also told her where she was going to work, confiscated her passport and threatened her with violence if she attempted to escape. He had also said that if she returned to Vietnam then other members of his gang would “take revenge” on her. The evidence gathered by the police when they arrested the man supports Ms A’s statement. Ms A has said that she is afraid to return to Vietnam.

Has Ms A been trafficked? What, if any, are the Czech Republic’s obligations towards Ms A?

6. The Practical Application of International Law

Working in international law

This class will look at what international law can actually mean for those of you who wish to pursue a career in the field. There are in fact many more options than you might have expected; some people are active in several fields:

- Academia
- International organisations
- Non-governmental organisations
- Private law firms
- Legal aid
- Training programmes
- Government: Ministries of Justice, Interior, Foreign Affairs, Immigration

Recapping the course

The course is very intensive. For this reason, and in order to help your learning, we will use some of the time to discuss any issues at all that you wish to raise arising out of the topics we have studied during the week. So, it is your chance to set the agenda: you are free to raise any issue at all as long as it is connected to the issues that we have studied.